sons who had been seduced into committing a crime by government officials, and yet on the other hand find as a matter of law that the government had become part and parcel of the illegal scheme, condoning its every move and sanctioning its progress, is, to say the least, incompatible and illogical. Under such circumstances as these, as a matter of law, the government is estopped from prosecuting these appellants for the government does not come into court with clean hands. To hold in this case that these appellants are guilty of crime is to concede that the government has committed crime, for the appellants' acts are those of the government. It is not necessary that the Government should have entered the conspiracy from the start in order to charge them with responsibility as a member. *Lile* v. *United States*, 264 Fed. 2nd, 278, held as follows:

> "A person may be held as a conspirator although he joins the criminal concert at a point in time far beyond the initial act of the conspirators. If he joins later, knowing of the criminal design, and acts in concert with the original conspirators, he may be held responsible, not only for everything which may be done thereafter, but also for everything which has been done prior to his adherence to the criminal design." See also:

Marino v. *United States*, 91 Fed. 2nd, 691;
Poliafico v. *United States*, 237 Fed. 2nd, 97.

If the government agents, upon learning of the existence of the illegal plan on January 20th, 1959, made their seizure, using such evidence as was then available to them or such other evidence as they would have been able to discover from a further investigation of past and present events, no estoppel would have existed against the government, even though Padgett was a con-

spirator, for at that time Padgett was not in the employ of the government and they would not have had to claim responsibility for his unlawful acts. A jury trying that case would have heard all the evidence produced by the government, including the testimony of Padgett, and could have arrived at a verdict untainted by the evidence discovered as a result of the illegal actions of the government agents following their having joined the conspiracy.

In the case of *O'Brien* v. *United States*, 51 Fed. 2nd, 674, it was held by the United States Court of Appeals for the Seventh Circuit that:

> "the use of decoys to induce others to join an unlawful conspiracy originated by the government for the purpose of securing the violation of laws by others"

is prohibited by federal law.

While in the case at bar the government agents did not join the conspiracy until after it had commenced, their entry on or about January 20, 1959, and their consent to continue the unlawful enterprise after that date, luring some of the petitioners who had not joined it until after that, made the government "responsible" in law "for everything which has been done" prior to their entry.

This is the rule imposed upon individuals, according to the conspiracy doctrine. Those who join a conspiracy after it has commenced become responsible for the original conspiracy.

> "We see no reason why the government should not be subjected to the same rule of conduct. Although it be a sovereign, it should not be permitted to adopt means which are condemned by the courts when practiced by its citizens. It may not be sued

save with its consent, it is true, but if it comes into court, it is as a litigant."

O'Brien v. *United States*, supra

The offense of conspiracy and related offenses where Padgett was involved as an aider and abetter would never have been completed had it not been for the actual labor and agreement of Padgett, and ultimately the Government. Padgett, according to the evidence, helped to set up the still. He had also entered into the very agreement which is made the gist of the conspiracy charge against these appellants.

> "The defense (entrapment) is available if the entrapping officer or person performs any of such essential acts. Nothing done by the entrapping person, who is present with the knowledge and consent of the victim, will be imputed to accused and the prosecution will fail if it is necessary that something done by such person should be imputed to accused in order to constitute the offense." *22 Corpus Juris Secundum*, Criminal Law No. 45 (b), p. 104.

How then can Padgett's participation in the operation or building of the distillery be imputed to the Appellants, when Padgett was at that time the employee of the Government? How, also, can Padgett's agreement with any of the Appellants be imputed to them as unlawful when it carried the sanction of the Government? Padgett's agreement with some of the Appellants was essential to the Government's case because without it there would have been no conspiratorial agreement. Padgett's agreement therefore was an "essential act" necessary to constitute an offense against Appellants. Padgett's labor in building the shed and erecting the still and making the liquor which was the end product

were all "essential acts" necessary to be performed to constitute the offense charged in the still count.

Respectfully Submitted,

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APPENDIX A

JUDGMENT

Extract from the Minutes of March 23, 1961

No. 18510

FULLER HOLT, ET AL.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEROF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18510

FULLER HOLT, ET AL.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(March 23, 1961.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

PER CURIAM: This is an appeal from convictions for conspiracy and various substantive counts of "moonshining".

Appellants' principal contention is that the participation of a paid government informer in their illegal activities estops the government from prosecutng them. The record clearly establishes that the government agent did not seduce otherwise innocent persons to violate the law. See *Park* v. *United States*, 5 Cir., 1960.

283 F.2d 253. Rather, the informants participation in their illegal activities was at the behest of the defendants in each instance. What the government paid for, and what it received in this case was information. We find nothing in the eliciting and utilization of this information which should estop this prosecution.

Appellant, Mrs. E. D. Holt, argues that there was insufficient evidence to support her conviction on counts 5 and 7 of the indictment. Her sentence of three years on probation could properly have been imposed as a result of her conviction under count 1. See 18 USCA 371. Where the evidence is sufficient to support a conviction on one count and the total sentence imposed does not exceed the maximum which may be imposed under that count, we will not consider the sufficiency of the evidence as to other counts. *Barenblatt* v. *United States*, 1959, 360 U. S. 109, 115.

The last point on appeal is that the evidence discloses three separate conspiracies, each revolving around the operations of a single still, rather than one general conspiracy. We think that the evidence discloses one conspiracy to produce "moonshine" and the intermittent operations of the respective stills were all in pursuance of that end.

The judgment of the court below is AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES

Deputy

New Orleans, Louisiana May 5, 1961